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No. 99-875

IN THE

# Supreme Court of the United States

LEONARD A. PELULLO,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

While incarcerated in a federal prison, awaiting sentencing in the Eastern District of Pennsylvania, and facing pending indictments in both the District of New Jersey and the Middle District of Florida, petitioner Leonard A. Pelullo spoke by telephone on numerous occasions with attorneys who were representing him in all three criminal proceedings in 1995. The United States Attorney for the Eastern District of Pennsylvania, employing Grand Jury subpoenas to obtain access to Mr. Pelullo's telephone conversations, dispatched government agents to listen to Mr. Pelullo's telephone calls and thereafter obtained recordings of his telephone conversations. Included among the calls to which the government obtained access are conversations between Mr. Pelullo and his attorneys on the witnesses, evidence, and strategies in all three cases. The Third Circuit held, as a matter of law, that the Bureau of Prisons' announced policy of routinely monitoring inmate telephone conversations stripped Mr. Pelullo's conversations with his attorneys of the protection afforded by the attorney-client privilege, such that Mr. Pelullo's Sixth Amendment right to counsel was not violated by the government's access to these privileged conversations. The question presented is:

Are a prison inmate's telephone conversations with the inmate's counsel entitled to any protection by the attorney-client privilege, such that government access to those conversations or recordings thereof, in pursuit of a criminal investigation rather than routine administrative monitoring, cannot violate the Sixth Amendment because the privilege has been waived as a matter of law by the inmate's use of a prison telephone to communicate with counsel?

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## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Leonard A. Pelullo respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this cause.

## OPINIONS AND ORDERS BELOW

The opinion of the Third Circuit, attached as Appendix A, is unreported. *See In re Grand Jury Proceedings*, 185 F.3d 861 (3d Cir. 1999) *(table citation)*. The opinion of the district court, Appendix B, is unreported.

## STATEMENT OF JURISDICTION

The Third Circuit issued its decision on June 18, 1999, Appendix A, and denied rehearing on August 23, 1999, Appendix C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

## STATEMENT OF THE CASE

### A. The Government's Access to Mr. Pelullo's Telephone Conversations.

In January 1995, Mr. Pelullo entered the Federal Correctional Institution at Fairton, New Jersey (FCI Fairton), following his conviction for embezzlement and related offenses in the Eastern District of Pennsylvania.[1] At the time that he entered FCI Fairton, Mr. Pelullo was facing a trial in the District of New Jersey and was also under indictment in the Middle District of Florida. Appendix D at 37a.

In 1995, government prosecutors in the Eastern District of Pennsylvania, acting through a grand jury, subpoenaed tape recordings of Mr. Pelullo's conversations on prison telephones. Appendix D at 37a. Mr. Pelullo first learned of the government's having obtained the tape recordings and having listened to his conversations from prison during post-trial proceedings, following his 1996 conviction in the District of New Jersey. Appendix D at 43a.

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1. The conviction that resulted in Mr. Pelullo's incarceration followed his fourth trial in the Eastern District of Pennsylvania. The first conviction, obtained in 1991, was reversed for a new trial by the Third Circuit on all but one count, *United States v. Pelullo*, 964 F.2d 193 (3d Cir. 1992), as was the second conviction, *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994). Mr. Pelullo's third trial ended in a mistrial when the jury was unable to reach a verdict, and, following his convictions in a fourth trial, the Third Circuit affirmed in part, reversed a conviction on one count, and ordered a remand for further proceedings. *United States v. Pelullo*, 105 F.3d 117 (3d Cir. 1997). The Third Circuit thereafter affirmed the district court's judgment on March 18, 1999. *United States v. Pelullo*, 173 F.3d 131 (3d Cir. 1999), *cert. denied*, __ U.S. __ (Oct. 4, 1999).

Mr. Pelullo raised a Sixth Amendment claim in a post-trial motion in the District of New Jersey after learning of the government's actions, and the District Court recognized that, "if the government had been intercepting and recording Pelullo's telephone conversations with his attorneys during his preparation for and the conduct of the trial in this case due process and his Sixth Amendment right to counsel would be implicated." *United States v. Pelullo*, 971 F. Supp. 159, 161 (D.N.J. 1997) (*citing Black v. United States*, 385 U.S. 26 (1966), and *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951)). The court, however, found "no evidence to support the conclusion that any government attorney either in the District of New Jersey or in the Eastern District of Pennsylvania has had possession of any recorded conversations between Pelullo and any of his attorneys" and, accordingly, rejected Mr. Pelullo's Sixth Amendment claim. *Id.* at 161.[2]

**B. The Proceedings Before the District Court.**

Mr. Pelullo thereafter filed his petition for disclosure of the tape recordings of his conversations before the grand jury judge in the Eastern District of Pennsylvania. Appendix D. Mr. Pelullo's petition asserted, in pertinent part, that production of the tape recordings was essential to support his claim of a Sixth Amendment violation arising from the government's intrusion into his privileged conversations in all three of the pending cases. *Id.* at 43a-46a. As the petition explicated, "[w]ithout having copies of the tapes and

2. Mr. Pelullo's conviction in the District of New Jersey was affirmed by the Third Circuit on June 15, 1999, in an unpublished opinion. *See United States v. Pelullo*, 185 F.3d 863 (3d Cir. 1999) (table citation). A petition for writ of certiorari directed to that decision is currently pending before this Court.

transcripts, Mr. Pelullo is virtually precluded from establishing the government's possession of the tapes" and the ensuing violation of the Sixth Amendment. *Id.* at 47a. In response, the government asserted that Mr. Pelullo should not be granted access to the tape recordings because, in part, "[n]one of the conversations Pelullo made on a telephone line that he knew was monitored and recorded . . . were protected by attorney-client privilege, since he had no expectation of privacy in those calls." Appendix E at 50a.

At the hearing before the district court on his petition, Mr. Pelullo testified that he had sought permission from FCI Fairton to make unmonitored calls to his counsel by means of "counselor calls," but was told that this procedure required prison counselors to be present in the room in which the conversation was taking place throughout the entire conversation. Appendix F at 60a-61a. Mr. Pelullo's testimony was confirmed by the testimony of Roberta Truman, an attorney advisor for the Bureau of Prisons, who testified that the procedure of having counselors remain in the room with inmates during calls to attorneys had been discontinued only a month prior to the June 1998 hearing in district court (and as a result of Mr. Pelullo's effort to secure the recordings). *Id.* at 57a-58a. Mr. Pelullo was also told by prison counselors that they would not be available to provide even these monitored "counselor calls," and that he was told, "you'll have to use the monitored phones" in response to his request for private conversations with his attorneys. *Id.* at 65a.

The government introduced Mr. Pelullo's signature on a series of "Acknowledgements of Inmate," including the following:

> The Bureau of Prisons reserves the authority to monitor (this includes recording) conversations on any telephone located within its institutions, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public. An inmate's use of institutional telephones constitutes consent to this monitoring. A properly placed phone call to an attorney is not monitored. You must contact your unit team to request an unmonitored attorney call.

Appendix F at 68a. A similar admonishment appears in an excerpt from the Inmate Handbook, also introduced by the government. *Id.* at 67a. Finally, the government introduced a notice that appears on inmate telephones, which notice reiterates the advisements set forth in the Inmate Handbook and the Acknowledgements of Inmate. *Id.* at 69a. None of these documents state that an inmate's use of prison telephones constitutes a waiver of the attorney-client privilege. *Id.*

Mr. Pelullo was also told that the prison officials were not "concerned with . . . my attorney/client calls and that they could not handle the volume of calls that I needed to make on the so-called unmonitored procedure." Appendix F at 65a. At the suggestion of the prison's counselors, Mr. Pelullo made certain that his attorneys identified themselves as attorneys and stated that each call was a privileged attorney-client conversation. *Id.* at 63a. Mr. Pelullo repeated his conversation with the prison counselors:

> [T]hey said to me . . . we can't handle the volume of your calls on the unmonitored line, where the guy sits in the room, and you'll have to use the

> other phones. I said, well, I'm talking to my attorneys and what's going to happen? They said, well, we only listen to — for security reasons. I said, well, I identify my attorneys. They said . . . then you shouldn't have a problem. . . .

*Id.* at 66a.

### C. The Rulings of the Courts Below.

The district court denied Mr. Pelullo's petition, relying on the government's exhibits and holding that, "[b]ecause petitioner knew that his telephone conversations were being monitored, he could not have reasonably expected that those conversations were confidential." Appendix B at 25a-26a. The court also rejected Mr. Pelullo's argument that the inmate telephones were the only means of communication available to him because prison counselors, even when available, remained present with inmates during "unmonitored" telephone calls. *Id.* at 28a-29a.[3] On Mr. Pelullo's appeal, the Third Circuit held, in pertinent part:

> The district court . . . correctly determined that the taped conversations were not protected by the attorney-client privilege. It is undisputed that Petitioner was aware that his calls were being monitored, and that he did virtually nothing to guard against staff members (or even inmates in the case of the "public" telephones) hearing his

3. In a post-trial ruling subsequent to the earlier ruling noted in the text, the New Jersey district court similarly ruled that Mr. Pelullo had "no expectation of privacy" in his telephone conversations with his attorneys. *United States v. Pelullo*, 5 F. Supp. 2d 285, 289 (D.N.J. 1998).

> conversation with his attorney. Thus, the court concluded that, because he had no reasonable expectation of confidentiality when he spoke to his attorneys, he had waived the attorney-client privilege. The court's conclusion that Petitioner could not have "reasonably expected that those conversations were confidential" was not clearly erroneous. Nor did the court clearly err in determining that Petitioner had alternative avenues to communicate confidentially with his attorneys, but failed to use them. Thus, we affirm the district court's determinations that the calls were not "confidential communications" protected by the attorney-client privilege. . . .

Appendix A at 9a-10a.

## REASONS FOR GRANTING THE WRIT

### THE QUESTION WHETHER THE ATTORNEY-CLIENT PRIVILEGE PROTECTS AN INMATE'S TELEPHONE CONVERSATIONS WITH COUNSEL SUCH THAT ALLOWING PROSECUTORIAL ACCESS TO ROUTINE RECORDINGS OF ATTORNEY-CLIENT CONVERSATIONS DOES NOT IMPINGE UPON THE SIXTH AMENDMENT RIGHT TO COUNSEL, IS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Almost 50 years ago, the Court of Appeals for the District of Columbia condemned the interception of conversations between an accused and counsel as anathema to the Sixth Amendment right to counsel because "an accused

does not enjoy the effective aid of *counsel if he is* denied the right of private consultation with [counsel]." *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951). The question presented by this case is whether the barrier of a prison wall between an accused and counsel so fundamentally alters the accused's expectation of privacy that government agents may, at will, rummage through those conversations to learn — and enhance prosecutorial efforts from — the otherwise-sacrosanct communications between attorney and client.

While this case comes before the Court on the Third Circuit's ruling that Mr. Pelullo cannot obtain the 1100 recordings produced by FCI Fairton to government prosecutors in the Eastern District of Pennsylvania, and the question of the extent to which prosecutors actually overheard (and used) attorney-client communications has never been resolved, the issue nonetheless is presented to the Court in a stark and unavoidable posture. The Third Circuit unequivocally held that Mr. Pelullo's conversations with his counsel on prison telephones *were not protected by the attorney-client privilege* because Mr. Pelullo had *no reasonable expectation of privacy* in those conversations. That holding gives prosecutors free and unrestrained access to inmate conversations with their attorneys on prison telephone systems, and the question thus presented to the Court is both weighty and of great constitutional importance. Moreover, recent actions by the Department of Justice, as will be detailed below, make it imperative that the Court authoritatively establish the Sixth Amendment limitations on the power of prison authorities to access attorney-client conversations.

### A. A Prison Inmate's Right to Privileged Conversations with Counsel.

The federal courts have uniformly recognized that monitoring of telephone conversations by prison authorities violates neither the Fourth Amendment nor Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20, because inmates are provided actual notice of the monitoring process and routine monitoring of inmate telephone calls is reasonable. *E.g.*, *United States v. Workman*, 80 F.3d 688, 692-95 (2d Cir.), *cert. denied*, 519 U.S. 955 (1996); *United States v. Van Poyck*, 77 F.3d 285, 291-92 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996); *United States v. Horr*, 963 F.2d 1124, 1126 (8th Cir.), *cert. denied*, 506 U.S. 848 (1992); *United States v. Amen*, 831 F.2d 373, 378-80 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988). The rationale for these decisions rests largely on this Court's decisions upholding prison regulations on such matters as access to media representatives, *Pell v. Procunier*, 417 U.S. 817, 822-24 (1974), and mail restrictions, *Thornburgh v. Abbott*, 490 U.S. 401, 413-16 (1989), *Turner v. Safley*, 482 U.S. 78, 86-89 (1987), *Bell v. Wolfish*, 441 U.S. 520, 550 (1979), which precedent defers to prison administrators on "the difficult judgments concerning institutional operations." *Turner*, 482 U.S. at 89 (citation omitted). The courts of appeals also have looked to this Court's decisions holding that a prisoner's right to privacy is severely curtailed, *e.g.*, *Hudson v. Palmer*, 468 U.S. 517 (1984), to support the principle that "no prisoner should reasonably expect privacy in his outbound telephone calls." *United States v. Van Poyck*, 77 F.3d at 290-91 (footnote omitted).

Absent the justification of routine prison management, however, the government's right of access to an inmate's

telephone conversations becomes less clear, *e.g.*, allowing a government law enforcement agent to hear recorded telephone conversations for criminal investigative purposes, "rather than for prison security purposes," is beyond the scope of the consent that is otherwise imputed to inmates who have been made aware of the routine monitoring procedures in federal prisons. *United States v. Lanoue*, 71 F.3d 966, 981-82 (1st Cir. 1995). Moreover, the generalized consent imputed to prison inmates *does not apply* to telephone conversations between a defendant and counsel. *United States v. Van Poyck*, 777 F.3d at 291 n.9; *accord*, *Harris v. Maloughney*, 827 F. Supp. 1488, 1496 (D. Mont. 1993) (distinguishing between monitoring for security reasons and monitoring of attorney-client telephone conversations).

This precedent is essentially codified in the Bureau of Prison's regulations:

> The Warden shall establish procedures that enable monitoring of telephone conversations on any telephone located within the institution, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public. The Warden must provide notice to the inmate of the potential for monitoring. *Staff may not monitor an inmate's properly placed call to an attorney*. The Warden shall notify an inmate of the proper procedures to have an unmonitored telephone conversation with an attorney.

28 C.F.R. § 540.102 (emphasis supplied).[4]

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4. In *United States v. Janis*, 820 F. Supp. 512 (S.D. Cal. 1992), *affirmed*, 46 F.3d 1147 (9th Cir.), *cert. denied*, 516 U.S. 860 (1995), the district court used the above-quoted regulation to craft a pretrial

(Cont'd)

Two decisions arising from the prosecution of General Manuel Noriega address the constitutional implications of prosecutorial access to an incarcerated defendant's conversations with counsel. In *United States v. Noriega*, 917 F.2d 1543 (11th Cir.), *cert. denied*, 498 U.S. 976 (1990), the Eleventh Circuit passed on a request by two broadcast news organizations to publish government recordings of telephone conversations between Noriega and his counsel. *Id.* at 1545. The court ultimately ordered the district court to conduct an evidentiary hearing on several matters, including Noriega's claim of attorney-client privilege, but declined to hold that Noriega's "understanding that all of his telephone conversations, including those with members of his defense team, would be recorded" constituted a *per se* waiver. *Id.* at 1551. The court noted that the monitoring of inmate telephone calls by prison authorities is not "unusual or unreasonable," but that "possession of such communications by one element of the government does not necessarily implicate another element." *Id.* at 1551 n.10.

The issue was revisited in *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991), on Noriega's subsequent motion to dismiss. The evidence showed that, as at FCI Fairton, the institution at which Noriega was incarcerated,

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(Cont'd)

order protecting the defendants' right to consult with his counsel. The court directed that the pretrial detention facility allow the defendant to conduct private telephone consultations with his counsel and directed the facility "not to disclose the contents of any taped or recorded conversations between Janis and his attorneys, investigators, or witnesses without further order of the court," while recognizing that the facility "may disclose the conversations internally, only if necessary, for security of the institution." *Id.* at 517-18.

the Metropolitan Correctional Center (MCC), automatically recorded all inmate telephone calls and that Noriega, like Mr. Pelullo, consented to the monitoring. *Id.* at 1483-85. Pursuant to the governing regulations, Noriega was also advised, as was Mr. Pelullo, that "[a] properly placed phone call to an attorney is not monitored." *Id.* at 1485. As at FCI Fairton, none of the documents or advisories defined "the term 'properly placed' call to an attorney." *Id.* The government presented evidence on "counselor calls," similar to the evidence presented at the hearing before the district court in this case. *Id.* at 1485-86. Because the instructions given to Noriega and his counsel "appear to have been inconsistent and to have resulted in a misunderstanding between prison authorities and Noriega" as to whether attorney calls would be monitored, the court held that Noriega had not been "sufficiently informed of the procedures for making an unmonitored, unrecorded call so as [to] make any expectation of privacy unreasonable." *Id.* at 1486-87.

In *United States v. DiDomenico*, 78 F.3d 294 (7th Cir.), *cert. denied*, 519 U.S. 1006 (1996), the Seventh Circuit, emphasizing that "[f]ree two way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful," 78 F.3d at 300 (citations omitted), exemplified the constitutional danger of allowing prosecutorial access to telephone conversations between inmates and their counsel by positing a hypothetical government practice:

> The government adopts and announces a policy of taping all conversations between criminal defendants and their lawyers. It does not turn the tapes over to the prosecutors. It merely stores them in the National Archives. . . . The

> hypothetical practice that we have described would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. . . .

*Id.* at 299.

In vivid contrast to these decisions, the Third Circuit flatly and unambiguously has held that a defendant's use of "monitored" telephones in a federal prison constitutes an *absolute waiver* of the attorney-client privilege, despite Mr. Pelullo having expressly been informed that his attorney calls would not be overheard and the *conceded* unavailability of *any* opportunity to make a truly "unmonitored" telephone call. The breadth of the Court's holding is readily apparent: the decision has given prosecutors *carte blanche* to rummage through the hundreds of recordings of Mr. Pelullo's prison conversations, to identify *all* of his otherwise-privileged conversations with his attorneys, and to listen to those conversations in their entirety. The decision also signals a complete retreat from the prior precedent on this difficult issue, and presages a new level of prosecutorial intrusion into the attorney-client relationship between the criminally accused and their counsel.[5] The necessity for review by this Court is plain and compelling.

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5. The Third Circuit's decision is unpublished; it cannot, however seriously be doubted that the decision will reach the eyes of many a federal prosecutor and that the temptation to test these new waters will be difficult, if not impossible, for prosecutors to resist.

## B. The Import of the Department of Justice Inspector General's Report on Prison Telephone Use.

In August 1999, the Inspector General of the United States Department of Justice issued a report on the Bureau of Prisons' management of inmate telephone usage. United States Department of Justice, Office of the Inspector General, *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges* (August, 1999) <http://www.USDOJ.gov/oig/bopcalls/ callstoc.htm>(IG Report).[6] The investigation giving rise to the IG Report was initiated because the Department of Justice believes that the Bureau of Prisons has failed to "address the abuse of prison telephones by inmates." IG Report, Executive Summary at 1. The primary finding by the Inspector General is that "the BOP's limited attempts to monitor inmate calls are virtually useless in preventing inmates from committing crimes using the telephones" because "only *3.5 percent* of the tens of thousands of calls made each day from BOP facilities are monitored." *Id.* at 3. This percentage comprises monitoring of 2.9% of "live calls by inmates" and official review of "an additional .7% of calls after they have been recorded." IG Report, Introduction at 4 n.1. At FCI Fairton, the institution in which Mr. Pelullo was incarcerated during the time that his telephone calls were obtained by government prosecutors, only *1.6% of inmate calls* are monitored "live," and *no* recorded calls are monitored by prison staff. IG Report, Table 1.

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6. The Inspector General has not yet released his report through the Government Printing Office. The citation in the text is to the Department of Justice website location at which the report can be found.

Moreover, the Inspector General's report reflects that the warning upon which the Third Circuit placed virtually-dispositive reliance, *i.e.*, the warning that inmate calls will be subject to monitoring, *does not apply* to attorney-client calls:

> In all BOP facilities, a notice is placed on inmate telephones advising the user that all conversations are subject to monitoring. Use of the telephones by inmates, therefore, constitutes their consent to this monitoring. *Inmate calls to attorneys are an exception to this rule and will not be monitored by BOP staff if the inmate follows proper procedures, established by the warden at each institution, to arrange and place attorney calls.*

IG Report, Legal and Regulatory Background at 2 (emphasis supplied). There is *no* uniform Bureau of Prisons policy on telephone usage; rather, the promulgation of policy is left to individual wardens at each institution. *Id.* at 1-2.

The Inspector General recognizes that the Courts, at least heretofore, have interpreted the Sixth Amendment to guarantee "adequate, effective, and meaningful" telephone contact between an inmate and his attorney. IG Report, Analysis at 1 n.43. The report references a Department of Justice memorandum, prepared by the Department's Office of Legal Counsel on January 14, 1997. *Id. See* Memorandum for John C. Keeney, Acting Assistant Attorney General, Criminal Division, from Richard L. Shiffrin, Deputy Assistant Attorney General, re: Disclosure of Recorded Inmate Telephone Conversations by the Bureau of Prisons (January 14, 1997) (Keeney Memorandum). The Keeney Memorandum recognizes that "adequate, effective, and

meaningful" telephone contact is required by the Sixth Amendment, subject only to "reasonable restrictions on access to attorney calls . . . especially when other means of attorney contact are available." *Id.* at 10-11.

Contrary to the Third Circuit's penultimate finding, the IG Report recognizes that the standard monitoring advisement *does not waive the attorney-client privilege.* This is consistent with the advice provided to Mr. Pelullo by officials at FCI Fairton. The report also confirms the accuracy of Mr. Pelullo's testimony that Bureau of Prisons personnel at FCI Fairton had told him that the telephones were "monitored for security purposes" only and that the institution was "not looking to monitor your calls with the attorneys." Appendix F at 62a-63a. Mr. Pelullo was never informed that his use of the prison telephones could constitute a waiver of his attorney-client privilege. *Id.* at 64a. The Inspector General's report reflects the accuracy of Mr. Pelullo's testimony, *i.e.*, that monitoring decisions were made at the institutional level, rather than by an across-the-board Bureau of Prison policy, and that the general consent by an inmate to monitoring *did not apply* to attorney-client calls. Indeed, the empirical evidence that FCI Fairton monitored only a *tiny percentage* of all "live" calls and *no* recorded calls is completely consistent with what Mr. Pelullo was told at the institution. The Third Circuit's blanket "waiver" holding is irreconcilable with these established facts: Mr. Pelullo could not possibly have understood that his use of the prison telephones would cause his attorney-client conversations to be overheard, much less that government *prosecutors* will be granted unrestricted access to recordings of those conversations.

Perhaps even more significantly, however, the Inspector General's report highlights the need for this Court's guidance on this critical issue. The Inspector General is critical of efforts by the Bureau of Prisons to counteract abuse of inmate telephone systems and states that, "unless the BOP places meaningful restrictions on inmate telephone privileges, steps up its monitoring of selected inmate calls, and disciplines telephone abusers consistently, no significant change in the level and seriousness of inmate telephone abuse will occur." IG Report, Executive Summary at 6. The Inspector General recommends "dramatic changes" in the current monitoring system, *id.*, Recommendations & Conclusion at 4, including "increased monitoring of inmate conversations and more efficiently targeted monitoring." *Id.* at 1. The Inspector General also recommends restricting inmates telephone privileges to enhance monitoring efforts. *Id.* The report contemplates that these changes will "be implemented by appropriate rulemaking procedures." *Id.* at 4 n.52.

Notably absent from *any* of the Inspector General's recommendations, however, is a mechanism for preserving an inmate's right to private telephone conversations with counsel, despite the Inspector General's recognition — and the earlier recognition by the Keeney Memorandum — that such a right exists and is entitled to significant protection. In the crucible of rulemaking proceedings that will be driven by the Inspector General's harsh condemnation of the Bureau of Prison's current system and his recommendations for curbing the abuses that the report identifies, scant attention likely will be paid to safeguarding the right of access to counsel, including private telephone conversations.

The Third Circuit's decision will inevitably have a destabilizing effect on the existing precedent — because *no*

*court* has held that an inmate's use of prison telephones, under the circumstances established by this record and verified by the Inspector General's report — constitutes an absolute wavier of the attorney-client privilege. That destabilizing effect, coming as it will at a time when the Bureau of Prisons is under fire from the Department of Justice and will, as a consequence, be closely examining all of its inmate-telephone policies, calls for this Court's authoritative announcement of the constitutional principles that govern an inmate's use of prison telephones to consult with counsel.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 18, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1804

IN RE: GRAND JURY PROCEEDINGS

On Appeal from an Order Entered in the
United States District Court for the
Eastern District of Pennsylvania
(Grand Jury No. 95-mc-00347-3)
District Judge: Hon. Eduardo C. Robreno

Argued June 8, 1999

Before: SLOVITER, MANSMANN
and MCKEE, *Circuit Judges*

(Filed **JUN 18 1999**)

* * *

### MEMORANDUM OPINION

MCKEE, *Circuit Judge*.

Petitioner, the target of a criminal investigation, appeals a district court order denying his petition for disclosure of his taped telephone conversations which federal prosecutors

had obtained through a grand jury subpoena issued in the Eastern District of Pennsylvania.[1] The conversations were originally taped pursuant to known Bureau of Prison policies while Petitioner was an inmate at a federal correctional institution. The district court denied the petition pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, which governs disclosure of grand jury materials. For the reasons below, we will affirm.

I.

Petitioner argues that the tapes are not "grand jury materials" within the meaning of Rule 6(e) because they were not recorded in anticipation of grand jury proceedings.[2] In

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1. Although Petitioner contends that the tapes were obtained by trial subpoena, the district court found that some of the tapes were subpoenaed by trial subpoena and some by grand jury subpoena. The district court explicitly noted in its order denying disclosure that its decision governed only those tapes subpoenaed by grand jury subpoena: "Petitioner acknowledges that copies of the [tapes subpoenaed by trial subpoena] were provided to him during a hearing [in an unrelated action]. Therefore, to the extent that petitioner is requesting disclosure of [trial-subpoenaed tapes], his request is denied as moot, and the Court's discussion is limited to those tapes obtained by grand jury subpoena." Accordingly, our review also is limited to the tapes subpoenaed by grand jury subpoena.

2. Rule 6(e) provides in relevant part:

> (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording

(Cont'd)

the alternative, he argues that, even if they are subject to Rule 6(e), disclosure is required because he has a "particularized need" for such materials. His "need" rests upon his assertion that the tapes prove that prosecutors in a completely independent criminal proceeding possessed privileged attorney-client communications during his trial, and therefore, violated his Sixth Amendment right to counsel. He also claims that he needs the tapes to show that the government failed to disclose exculpatory evidence in that trial, and that the tapes are necessary to effectively defend himself in other actions currently pending against him.

The district court ruled that the requested materials fell within the scope of Rule 6(e) because disclosure could reveal information about the grand jury proceedings. The government subpoenaed only recordings of calls made to specified phone numbers, and the court therefore concluded that disclosure would reveal the identities of potential targets and witnesses, and the general direction of the investigation. The court also held that the conversations were not privileged because Petitioner did not have a reasonable expectation of confidentiality when he knowingly made monitored telephone calls. Moreover, the court held that Petitioner had not established a Sixth Amendment violation because he did not take any meaningful steps to make private calls to his

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(Cont'd)

> device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

attorneys. The court also rejected Petitioner's claim that he needed the tapes to show that the government withheld exculpatory evidence in other criminal proceedings and to mount a defense in other cases. The court concluded that Petitioner had not established with sufficient specificity how the requested information would assist his defense, or how he would be prejudiced by nondisclosure.

II.

After an independent review of the record before us, we are satisfied that the district court did not abuse its discretion by denying the petition to disclose. *See United States v. McDowell*, 888 F.2d 285, 289 (3d Cir. 1989) (a district court's decision whether to disclose grand jury information is reviewed for abuse of discretion). It is well established that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."[3] *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 63 (1982). "The policy of secrecy is 'designed to protect from disclosure *only the essence of what takes place in the grand jury room*, in order to preserve the freedom and integrity of the deliberative process.' " *Catania*, 682 F.2d at 63 (emphasis added). Thus, Federal Rule of Criminal Procedure 6(e)

3. The interests served by maintaining the confidentiality of grand jury proceedings include (1) protecting witnesses; (2) encouraging full and frank testimony; (3) preventing potential indictees from fleeing; (4) impeding witness tampering or subornation of perjury; and (5) shielding those who have been exonerated from public ridicule. *Douglas Oil*, 441 U.S. at 219; *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1411 (9th Cir. 1993).

generally prohibits disclosure of "matters occurring before the grand jury."

Petitioner argues that Rule 6(e) does not apply to the tapes and transcripts he is seeking because they were generated pursuant to internal prison policies independent of, and unrelated to, any grand jury investigation. We have stated that

> when testimony or data is sought for its own sake — for its intrinsic value in the furtherance of a lawful investigation — rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

*Grand Jury Investigation (New Jersey State Commission of Investigation)*, 630 F.2d 996, 1001 (3d Cir. 1980). Thus, if materials are created independent of the grand jury process, they are not shielded from disclosure simply because they were turned over to the grand jury. *Id.* at 1000-01 ("The mere fact that a particular document is reviewed by a grand jury does not convert it into a 'matter occurring before the grand jury' within the meaning of 6(e)") Accordingly, in *New Jersey State Commission*, we concluded that the defendants could not shield original copies of business books and records from production simply because they had been subpoenaed during a completely independent grand jury proceeding. *Id.* Similarly, in *Catania*, we refused to extend Rule 6(e) to tape recordings and transcripts created in conjunction with an FBI

investigation wholly independent of the grand jury process. 682 F.2d at 64-65. There, our holding rested in large part on the fact that the District Attorney was not even sure which portions of the tapes and transcripts had been presented to the grand jury. Thus, disclosure could not reveal anything about the grand jury inquiry.

Nevertheless, materials created independently of grand jury proceedings may still be covered by the secrecy requirements of Rule 6(e). The key inquiry is whether the materials "could disclose what transpired before the grand jury," regardless of the circumstances of their creation. *Id.* at 64-65; *see also Senate of the Commonwealth of Puerto Rico v. U.S. Dept. of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987) ("the touchstone is whether the disclosure would tend to reveal some secret aspect of the grand jury's investigation"). For example, had the District Attorney in *Catania* edited, redacted, summarized, or otherwise excerpted specific information from the transcripts and tapes before presenting the information to the grand jury, the result likely would have been different because disclosure would have revealed the District Attorney's thought processes and strategies in prosecuting the case. *See* 682 F.2d at 64 ("since the District Attorney does not know what part of the material . . . was presented to the grand jury, this is not a case where information disclosed independently . . . could disclose what transpired before the grand jury"); *see also, e.g., Garden Court Nursing Home*, 697 F.2d at 513 ("These [audit] analyses are not merely summaries that reveal nothing about what transpired before the grand jury. Rather they contain the auditors' conclusions about whether particular expenses are legitimately attributable to the operation of [the defendant].").

Here, the government subpoenaed tapes of telephone calls made to *specified* phone numbers. In addition, as Petitioner concedes, the tapes that he did receive included a notation stating "non-pertinent conversation edited." Inasmuch as the prosecutors identified particular telephone numbers and utilized only relevant portions of those conversations pertinent to its investigation, the district court did not err in concluding that "disclosure of the requested information would reveal the identities of potential targets of the investigation, the identities of potential witnesses, the acts being investigated, and the direction of the investigation." We therefore agree that the tapes and transcripts are covered by Rule 6(e).

Thus, the district court properly determined that disclosure would be warranted only if Petitioner could show that the disputed materials fell within one of the exceptions to secrecy set forth in Rule 6(e).[4] *See United States v. Smith*,

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4. Rule 6(e)(3) provides for the following exceptions to the general rule:

> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;
>
> (iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(Cont'd)

123 F.3d 140, 148-49 (3d Cir. 1997) (recognizing that Rule 6(e) creates a general rule of confidentiality for all "matters occurring before the grand jury," and that Rule 6(e) provides only "narrow exceptions to the general rule of grand jury secrecy."). Petitioner argues that the tapes are excepted under Rule 6(e)(3)(C)(i) because he needs the tapes in connection with judicial proceedings unrelated to the grand jury proceedings. The Supreme Court has stated:

> [p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.[5]

*Douglas Oil*, 441 U.S. at 222. In addition,

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(Cont'd)

> (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

Fed.R.Crim.Proc. (6)(e)(3)(C).

5. Although *Douglas Oil* involved grand jury transcripts, this Court, as well as others, have applied this three prong test to other grand jury materials. *See, e.g.*, *Catania*, 682 F.2d at 63-64 (applying *Douglas Oil* to the disclosure of FBI tapes and transcripts).

> [t]he seeking party must set forth a "particularized" need for the desired disclosure. Once a party makes the required showing of need, the district court must weigh the competing interests and order so much disclosure as needed for the ends of justice. In undertaking such a determination, the district court necessarily is infused with substantial discretion.

*Catania*, 682 F.2d at 64 (internal quotation marks and citations omitted).

Petitioner asserts that he needs the materials to mount a Sixth Amendment challenge to a prior conviction based upon the prosecution's alleged use of privileged conversations in that case.[6] The district court, however, correctly determined that the taped conversations were not protected by the attorney-client privilege. It is undisputed that Petitioner was aware that his calls were being monitored, and that he did virtually nothing to guard against staff members (or even inmates in the case of the "public" telephones) hearing his conversation with his attorneys. Thus, the court concluded that, because he had no reasonable expectation of

6. In particular, Petitioner argues that the alleged use of some of the taped conversations between himself and his attorneys violated the attorney-client privilege and/or the Sixth Amendment right to counsel. He argues that he could not have waived the privilege with respect to certain calls because the prison allegedly did not provide him any means to make unmonitored telephone calls to his attorneys. In addition, he argues that the prison's alleged failure to provide access to unmonitored telephone lines violated his Sixth Amendment right to counsel.

confidentiality when he spoke to his attorneys, he had waived the attorney-client privilege. The court's conclusion that Petitioner could not have "reasonably expected that those conversations were confidential" was not clearly erroneous. Nor did the court clearly err in determining that Petitioner had alternative avenues to communicate confidentially with his attorneys, but failed to use them. Thus, we affirm the district court's determinations that the calls were not "confidential communications" protected by the attorney-client privilege, and therefore, Petitioner did not establish a "particularized need" based upon any alleged Sixth Amendment violation.

Petitioner also contends that he needs the tapes to show that prosecutors in an earlier criminal trial withheld exculpatory evidence, and to prepare for his defense in judicial proceedings in Florida. The district court held that Petitioner had not asserted how the tapes would be of assistance with sufficient specificity. As noted previously, the party seeking disclosure under Rule 6(e) has the burden of showing "that the material they seek is needed to avoid *a possible injustice* in another judicial proceeding." *Garden Court Nursing Home*, 697 F.2d at 513 (quoting test articulated in *Douglas Oil*) (emphasis added). We have previously held that "[w]ithout a showing that disclosure is necessary to avoid possible injustice . . . the moving party cannot establish particularized need." *Id.* at 514 (quoting *In re Disclosure of Evidence*, 650 F.2d 599, 601 (5th Cir. 1981), with approval). Petitioner must do more than argue that production of the tapes and transcripts would facilitate his defense. "Access to grand jury materials cannot be had merely for the convenience of [ ] investigation." *Id.* at 513-

14 (citing *Catania*, 682 F.2d at 66). Similarly, Petitioner can not gain access under rule 6(e) for impeachment purposes or to refresh a witness's recollection. *Id.* at 514 n.1 ("[such a] request is clearly premature since [the party seeking disclosure] has not even alleged that it plans to interview specific witnesses"); *see also Douglas Oil*, 441 U.S. at 222 n.12 ("the typical showing of particularized need arises when a litigant seeks to use the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like").

Petitioner has alleged vague and unsupported allegations that prosecutors withheld exculpatory evidence in his prior trial. He does not assert any "injustice" which would result if he is denied access to the tapes to use in future proceedings. Accordingly, he has failed to meet his burden of demonstrating the kind of prejudice necessary to show a "particularized need" for the materials he is seeking.

III.

Petitioner also asserts a new basis for disclosure which was not available to him when he filed his petition with the district court. After the district court denied his petition for disclosure under Rule 6(e), the Office of the United States Attorney inadvertently sent him, among other things, a copy of the government's original grand jury subpoena for the tapes, and the supporting affidavit. Petitioner now argues that disclosure should be granted because the secrecy of the grand jury process is no longer of concern, i.e., the subpoena supplied to him already disclosed the information Rule 6(e) would have protected.

This Court has previously rejected the argument that "grand jury material or putative grand jury material, once disclosed, even if inadvertently, is no longer subject to the protections of Rule 6(e)." *Smith*, 123 F.3d at 154.

> At bottom, it is clear to us that a court is simply not powerless, in the face of an unlawful disclosure of grand jury secrets, to prevent all further disclosures by the government of those same jury secrets. In other words, even if grand jury secrets are publicly disclosed, they may still be entitled to at least some protection from disclosure.

*Id.* Our holding in *Smith* rested in part on the Supreme Court's decision in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). In that case, Justice Department lawyers from the Civil Division had access to certain grand jury materials for two years before the Court of Appeals for the Ninth Circuit held that they were not entitled to the materials under any of the Rule 6(e) exceptions. Despite this prior disclosure, the Supreme Court rejected the government's argument that the disclosure issue was moot, holding:

> The controversy here is still a live one. . . . Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed. We cannot restore the secrecy that has already been lost but we can grant partial relief by preventing further disclosure.

*Sells Engineering*, 463 U.S. at 422 n.6 (internal quotations omitted). Thus, the inadvertent disclosure of information relating to the grand jury materials in this case does not alter the district court's determination that the requested tapes could reveal "matters occurring before the grand jury." Inasmuch as the form and content of the body of requested material inherently imparts information about the prosecution's investigation and strategy, it falls within the scope of Rule 6(e).

Petitioner also misunderstands the prerequisites for disclosure of grand jury materials governed by Rule 6(e). Despite Petitioner's argument to the contrary, the government's inadvertent disclosure does not eliminate Petitioner's burden of demonstrating "particularized need." *See Douglas Oil*, 441 U.S. at 222 & n.13 (Holding that the particularized need standard for determining when the traditional secrecy of the grand jury may be broken applies "even when the grand jury whose transcripts are sought has concluded its operations," or "the [materials] sought already ha[ve] been given to the [targets of] a grand jury investigation.") (internal quotation marks and citations omitted). Even if the disclosure reduces the need for continued secrecy under the *Douglas Oil* standard, Petitioner must still show that he seeks the material to avoid possible injustice in another proceeding, and that his disclosure request is structured to cover only material so needed. *See id.* Moreover, the Supreme Court has cautioned that "in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries." *Douglas*

*Oil*, 441 U.S. at 222. Thus, we will not disturb the district court's decision simply because Petitioner inadvertently gained access to information about the requested materials.

IV.

For the foregoing reasons, we affirm the district court's order.

TO THE CLERK:

Please file the foregoing memorandum opinion.

s/ [illegible]
Circuit Judge

*Appendix A*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1804

IN RE: GRAND JURY PROCEEDINGS

On Appeal from an Order Entered in the
United States District Court for the
Eastern District of Pennsylvania
(Grand Jury No. 95-mc-00347-3)
District Judge: Hon. Eduardo C. Robreno

Argued June 8, 1999

Before: SLOVITER, MANSMANN
and MCKEE, *Circuit Judges*.

JUDGMENT

This case came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered on September 3, 1998, be and the same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ P. Douglas Sisk
Clerk

**JUN 18 1999**

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED SEPTEMBER 3, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GRAND JURY
NO. 95-347-03

IN RE GRAND JURY PROCEEDINGS

MEMORANDUM

EDUARDO C. ROBRENO, J. SEPTEMBER 3, 1998

The petitioner filed a motion for disclosure of materials relating to proceedings before a federal grand jury. Specifically, petitioner asks that the Government deliver to him the following items: (1) audio tapes of telephone conversations in which petitioner participated while in custody at FCI-Fairton, which were produced by the prison officials to a federal grand jury in the Eastern District of Pennsylvania, pursuant to a subpoena; (2) transcripts of the telephone conversations contained in the tapes that were prepared by the government; (3) copies of all grand jury subpoenas in this matter; and (4) submissions, if any, made by the government to the grand jury that were derived from the above listed items. For the reasons that follow, the petitioner's motion will be denied.

*Appendix B*

## I. BACKGROUND

The petitioner is a defendant in three separate criminal cases: one in the Eastern District of Pennsylvania (the "Philadelphia action"); one in the District of New Jersey (the "Newark action"); and one in the Southern District of Florida (the "Jacksonville action"). The Jacksonville action is still in its pre-trial stage.

In the Philadelphia action, petitioner has been the subject of a protracted prosecution. After a fourth trial, petitioner was convicted of a RICO count and 46 wire fraud counts. Petitioner appealed the conviction, and for reasons unrelated to this motion, the Third Circuit vacated the petitioner's conviction on one count. The case was remanded to the district court for an evidentiary hearing. The district court, after holding the evidentiary hearing, declined to grant the petitioner a new trial.

In 1995, while petitioner was at FCI-Fairton in connection with the Philadelphia prosecution, all of petitioner's telephone conversations, which were placed on the telephones made available to inmates by the Bureau of Prisons, were monitored and taped by the Bureau of Prisons. The taping and monitoring was required by Bureau of Prison policy. Pursuant to a subpoena issued by a federal grand jury in the Eastern District of Pennsylvania (a grand jury proceeding unrelated to the three criminal actions listed above), the government obtained from the Bureau of Prisons tape recordings of certain of the telephone conversations. The subpoenas requested tapes pertaining to calls placed by petitioner to certain telephone numbers during specified

periods of time. Hereinafter, the Court will refer to the subpoenaed tapes as "the FCI-Fairton tapes."

Petitioner contends that after the conclusion of the Newark trial, where he was also found guilty, he learned for the first time that the United States Attorney's Office in the Eastern District of Pennsylvania was in possession of the FCI-Fairton tapes subpoenaed by the grand jury.[1] Based on this alleged newly acquired information, petitioner filed a motion for a new trial in the Newark action. In his motion, petitioner argued that his Fifth and Sixth Amendment rights were violated because during the Newark trial, the Government was in possession of the FCI-Fairton tapes containing attorney-client privileged conversations. According to petitioner, the FCI-Fairton tapes contained conversations with his counsel regarding the evidence, witnesses, testimony, etc. in the Newark, Philadelphia and Jacksonville actions, as well as discussions pertaining to defense strategies for combating the government's cases. The Newark court denied petitioner's motion for a new trial on two bases: first, that there was no evidence to support the conclusion that any government attorneys either in the District of New Jersey or the Eastern District of Pennsylvania had possession of recorded conversations between the

1. The Government disputes petitioner's claim that he did not learn of the FCI-Fairton tapes until after the conclusion of the Newark trial. According to the Government, petitioner requested the tapes prior to the Newark trial, but chose not to pursue the request after the Assistant United States Attorney prosecuting the Newark case informed petitioner that he had not heard the tapes and would not use them at trial.

petitioner and his attorneys; and second, that none of the government attorneys trying the Newark action were privy to the communications between petitioner and his attorneys that were contained on the FCI-Fairton tapes, and that were in the possession of the government lawyers in the Eastern District of Pennsylvania. Petitioner's Newark conviction is now on appeal.

## II. STANDARD OF REVIEW

"It is well settled federal policy that the grand jury system requires secrecy of grand jury proceedings." *In re Grand Jury, Catania*, 682 F.2d 61, 63 (3d Cir. 1982) (citing *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979)). Federal Rule of Criminal Procedure 6(e) preserves this norm of secrecy by preventing the disclosure of "matters occurring before a grand jury." *Id. See also* Fed. R. Crim. P. 6(e)(2). The purpose of Rule 6(e) is to: (1) prevent the escape of prospective indictees; (2) insure the grand jury unfettered freedom in its deliberations; (3) impede the subornation of perjury and tampering with witnesses by targets of the investigation; (4) encourage forthrightness in witnesses without fear of retaliation; and (5) act as a shield for those who are exonerated by the grand jury. *United States v. Dynavac*, 6 F.3d 1407, 1411 (9th Cir. 1993).

The secrecy of Rule 6(e), however, is not absolute. The rule contains a number of exceptions. For example, Rule 6(e)(3)(C)(i), the exception at issue in this case, provides that disclosure of grand jury materials is permitted if "directed by a court preliminary to or in connection with a

judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i).[2] Under Rule 6(e)(3)(C)(i), matters occurring before the grand jury may be disclosed if the seeking party demonstrates a

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2. Federal Rule of Criminal Procedure 6(e) reads, in relevant part, as follows:

> **(e) Recording and Disclosure of Proceedings**
>
> . . .
>
> **(2) General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made pursuant to (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.
>
> **(3) Exceptions.**
>
> . . .
>
> (c) Disclosure otherwise prohibited by this rule of matters occurring before a grand jury may also be made —
>
> (1) when so directed by a court preliminary to or in connection with a judicial proceeding; . . .

" 'particularized' need for the desired disclosure." *In re Grand Jury Matter, Appeal of Catania*, 682 F.2d 61, 64 (3d Cir. 1982) (citing *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958)). In other words, the petitioner must show: (1) that "the material they seek is needed to avoid a possible injustice in another judicial proceeding;" (2) "the need to disclose is greater than the need for continued secrecy;" and (3) the "request is structured to cover only material so needed." *Id.* at 63-64 (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979)). Once a party makes such a showing, the Court must then weigh the competing interests and permit only as much disclosure as is required for the ends of justice. *Id.* "In making such a determination, the district court 'necessarily is infused with substantial discretion.' " *Id.* (quoting *Douglas Oil Co.*, 441 U.S. at 222).

## III. ANALYSIS

Here, petitioner presents two arguments for disclosure of the materials he has requested. First, he argues that the prohibition against disclosure of grand jury information contained in Rule 6(e) does not apply to the FCI-Fairton tapes and transcripts of the FCI-Fairton tapes prepared by the government ("the transcripts") because the FCI-Fairton tapes and transcripts are pre-existing records prepared for purposes independent of the grand jury and, therefore, are collateral to the grand jury proceeding. Second, petitioner claims that to the extent that Rule 6(e) applies to the materials requested, the exception contained in Rule 6(e)(3)(c)(i), i.e., an exception permitting courts to direct disclosure of grand jury materials preliminary to or in connection with judicial

proceedings, entitles him to copies of grand jury subpoenas in this investigation, minutes of grand jury proceedings, the FCI-Fairton tapes, and the transcripts because he has a "particularized need" for those materials.

A. *Rule 6(e) Applies to All of the Items Sought by Petitioner*

The sweep of Rule 6(e) is broad. Rule 6(e) "applies not only to information drawn from transcripts of grand jury proceedings, but also to anything which may reveal what occurred before the grand jury." *Id.*; *In re Grand Jury Matter, Garden Court Nursing Home*, 697 F.2d 511 (3d Cir. 1983). *See also United States v. Smith*, 123 F.3d 140, 149-50 (3d Cir. 1997) (citing 1 Charles Alan Wright, *Federal Practice and Procedure* § 106, at 250 (1982) for the proposition that Rule 6(e) applies to "anything that might tend to reveal what happened in the grand jury room"). In other words, "the touchstone is whether the disclosure would tend to reveal some secret aspect of the grand jury's investigation . . . ." (Pl.s Mem. at 11 (doc. no.1) (quoting *Senate of the Commonwealth of Puerto Rico v. U.S. Department of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987)).

Petitioner argues that, in this case, disclosure of the FCI-Fairton tapes and the transcripts could not possibly reveal "some secret aspect of the grand jury's investigation" because, as a participant in all of the conversations, a fortiori, he is already aware of all the information contained on the tapes. The Court disagrees. Because the grand jury subpoenas covered only some, not all, of the telephone calls made by petitioner, disclosure of the FCI-Fairton tapes and transcripts

would reveal the specific telephone numbers for which the subpoenas were issued. Thus, disclosure of the requested information would reveal the identities of potential targets of the investigation, the identities of potential witnesses, the acts being investigated, and the direction of the investigation. Therefore, Rule 6(e) applies to the tapes and the transcripts.

B. *Petitioner has Failed to Demonstrate a Particularized Need for the Materials*

Petitioner asserts three bases for his claim of a "particularized need" for the requested materials. First, petitioner claims that he needs the FCI-Fairton tapes and transcripts as part of his appeal in the Newark case to establish that the government possessed attorney-client privileged communications during the Newark trial, and therefore, violated his Fifth and Sixth Amendment right to counsel by intruding upon his attorney-client relationships. Second, petitioner also wishes to use the FCI-Fairton tapes and transcripts to demonstrate that the government failed to comply with its obligation to disclose exculpatory evidence. Finally, petitioner claims that he needs the FCI-Fairton tapes and transcripts in order to effectively defend himself in the Philadelphia and Jacksonville actions.[3]

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3. The tapes requested by petitioner fall into two categories. The first are those subpoenaed by the grand jury and the second are tapes that were subpoenaed by the government by trial subpoena. Petitioner acknowledges that copies of the second category of tapes were provided to him during a hearing relating to the Newark action. (Pet.'s Surreply at 3). Therefore, to the extent that petitioner is requesting disclosure of the second category of tapes, his request is denied as moot, and the Court's discussion is limited to those tapes obtained by grand jury subpoena.

*Appendix B*

1. *The FCI-Fairton tapes do not contain privileged conversations*

Petitioner's claim is that he needs the FCI-Fairton tapes and the transcripts to demonstrate that the government violated his Fifth and Sixth Amendment right to counsel in the Newark trial by obtaining tape recordings of conversations subject to the attorney-client privilege.

To invoke the attorney-client privilege the party asserting it must establish that the communication was: (1) between a client and an attorney; (2) for the purposes of obtaining legal advice; (3) in confidence; (4) not for the purpose of committing a crime or tort; and (5) the privilege was not waived. *Rhone-Poulec Rover, Inc. v. Home Indemnity Co.*, 32 F.3d 851, 862 (3d Cir. 1994). At issue here is whether the communications between petitioner and his attorneys were made in confidence. The burden is on the party asserting the attorney-client privilege to show that the communication at issue was made in confidence. *In re Grand Jury Empaneled February 14, 1978*, 603 F.2d 469, 474 (3d Cir. 1979).

A communication is made "in confidence" only if it was "intended to remain confidential *and* (2) under the circumstances was *reasonably* expected and understood to be confidential." *United States v. Noriega*, 917 F.2d 1543, 1551 (11th Cir. 1990) (emphasis added). In other words, petitioner's subjective belief that a conversation with his attorney was confidential, by itself, is not sufficient to cloak the conversation with the privilege if it was unreasonable for petitioner to expect the conversation to remain confidential. *United States v. Furst*, 886 F.2d 558, 575-576

(3d Cir. 1989). For example, if the petitioner was aware that a non-attorney third party was listening to the conversation at issue, there would be no reasonable expectation of confidentiality. *Id. See also United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981).

At a June 17, 1998 hearing before this Court, petitioner admitted that he knew his telephone calls from FCI-Fairton were monitored by prison officials and that someone could be listening to the conversation at any time. (Tr. 6/17/98 at 97-98).[4] Because petitioner knew that his telephone

4. The government also submitted ample evidence on this point. Two government witnesses testified that petitioner received notice of the monitoring of calls during a previous entry into the federal prison system at FCI Schuylkill, and again upon entering Fairton. (Tr. 6/17/98 at 12-18, 30-33; Gov. Ex. 1, 2). Joseph Gadonis, a case manager at FCI Schuylkill, testified that all new inmates coming to FCI Schuylkill sign an intake form that acknowledges their receipt of the Bureau of Prisons Admission & Orientation booklet. The booklet informs the inmate that his telephone calls will be subject to monitoring and recording, and that the inmate can place an unmonitored call to an attorney by contacting a counselor. (Tr. 6/17/98 at 12-18; Gov. Ex. 1). Inmates also sign an acknowledgment form. (Tr. 6/17/98 at 15-16; Gov. Ex. 2). The acknowledgment form states that the Bureau of Prisons reserves the right to monitor calls, and again informs the inmate of how to request an unmonitored phone call. (Tr. 6/17/97 at 16-17; Gov. Ex. 2). Upon entering FCI Schuylkill in 1993, prior to being an inmate at FCI Fairton, petitioner signed both the intake form and the acknowledgment form. (Tr. 6/17/98 at 12-18; Gov. Ex. 1, 2). The government's second witness, Roberta Truman, testified that the same procedure and forms used at FCI-Schuylkill are used when inmates enter FCI Fairton. (Tr. 6/17/98 at 30-33). While petitioner's FCI Fairton prison file cannot

(Cont'd)

conversations were being monitored, he could not have reasonably expected that those conversations were confidential. Therefore, the conversations are not protected by the attorney-client privilege. *See United States v. Furst*, 886 F.2d at 575-576; *United States v. Noriega*, 764 F. Supp. 1480, 1487 (S.D.Fl. 1991).

Petitioner relies upon *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991), which held that, under the

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(Cont'd)
be located to obtain copies of the intake and acknowledgment forms signed by petitioner upon arriving at FCI Fairton. Ms. Truman testified that, if found, the FCI Fairton file likely would contain the same forms used by FCI Schuylkill.

The government also submitted evidence that the telephone room from which petitioner placed the calls was clearly marked with signs informing inmates that their calls would be monitored. (Tr. 6/17/98 at 34-37; Gov. Ex. 6). The signs, which were placed on the door to the telephone room and on the wall above the telephones stated:

> Pursuant to Bureau of Prisons Inmate Telephone regulations: *All conversations* on this telephone are subject to monitoring. Your use of this telephone constitutes consent to monitoring. You must contact your unit team to request an unmonitored attorney call.

(*Id.*).

Finally, the government presented evidence that petitioner routinely asked his attorneys to identify themselves. (Gov. Ex. 8). This indicates that petitioner was aware that a third party was listening to his conversation.

*Appendix B*

Sixth Amendment, conversations between an inmate and the inmate's attorney are protected from government intrusion if they are: (1) intended to remain confidential and (2) under the circumstances were reasonably expected and understood to be confidential. 764 F. Supp at 1484. In *Noriega*, the court ruled that "on the record before it, the court cannot say that Noriega was sufficiently informed of the procedures for making an unmonitored, unrecorded call so as to make any expectation of privacy unreasonable."[5] The court also stated:

> Whether or not Noriega received adequate notice of [the procedures for placing unmonitored call] would, of course, be irrelevant if in fact Noriega was actually aware that his calls to his attorneys

5. The *Noriega* Court reached its conclusion based on a very unique set of facts. Because of Noriega's notoriety, he was housed separately from other prisoners. Instead of using the same phones used by other inmates, a telephone was installed outside the door of his cell. A sticker on the phone stated that "properly placed" calls would not be monitored. Noriega's counselor claimed to have explained to Noriega, through an interpreter, that he must contact a member of his unit team to obtain an unmonitored call. However, Noriega's attorney claimed that he was told that Noriega simply had to notify the guard that he was calling an attorney and the call would not be monitored even though it was being placed on the same phone as monitored calls. The Court also noted that the guard kept a log on which he distinguished calls to attorneys from social calls. Based on Noriega's unique phone arrangement and because of the discrepancies in the instructions given to Noriega and his attorney regarding how to secure an unmonitored call, the Court found that Noriega could have reasonably believed that calls to his attorney were not monitored. *Noriega*, 764 F. Supp. at 1484-1485 (S.D.Fl. 1991).

> were being monitored. In such case, Noriega could not claim that these conversations were intended to remain confidential . . . .

*Id.* at 1487-88. Here, *Noriega* is of no assistance to petitioner because he has admitted that he actually knew that his calls were being monitored, and therefore, "cannot now claim that these conversations were intended to remain confidential". *Id.*

In summary, since the conversations contained on the FCI-Fairton tapes were not confidential and therefore not privileged, petitioner's right to counsel was not violated. In the absence of a cognizable claim that petitioner's right to counsel was invaded by the government, petitioner cannot show a "particularized need" for the FCI-Fairton tapes.

Next, petitioner argues that even if the telephone conversations were not privileged, his Sixth Amendment right to counsel was violated because while at FCI-Fairton the prison officials prevented him from making unmonitored calls to his attorney. In support of this argument, petitioner testified that, although in theory arrangements for unmonitored calls could be made through a prison counselor, as a matter of practice, the counselor remained in the room while the inmate conversed with his attorney.[6] According to

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6. Each housing unit in the prison contains a telephone room to which inmates have access. Each of these rooms has three phones, and these are the phones that are monitored. If an inmate wants to place an unmonitored call, he informs a correctional counselor of his need to engage in a confidential conversation with his attorney. (Cont'd)

petitioner, when faced with the reality that counselors remained in the room within hearing distance during conversations between inmates and their attorneys, he concluded, in essence, that it was futile to attempt to arrange for unmonitored calls through the counselor.

Assuming that petitioner's assertions regarding unmonitored calls are true, nevertheless, the Court concludes that the petitioner was not free to disregard prison regulations and establish sua sponte a system of his own for making unmonitored calls. For example, petitioner did not complain to the attorney-advisor at the prison about his claim that prison personnel ordinarily remained in the room during conversations with counsel, or cause any of his attorneys to do so on his behalf. (Tr. 6/17/98 at 38-39). Nor did petitioner seek intervention from the courts. *See e.g., Casey v. Lewis*, 834 F. Supp. 1553 (D. Ariz. 1992). Under these circumstances, the Court cannot conclude that petitioner was denied reasonable access to his attorneys.

2. *Petitioner's claim that the government withheld exculpatory evidence is without merit*

Although petitioner makes generalized claims that he needs the FCI-Fairton tapes and transcripts to show that the

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(Cont'd)

The counselor will then arrange for the inmate to make a call on one of the prison's staff phones. These phones are located in the offices of staff members and are not monitored by the Bureau of Prisons. The staff offices have glass walls and doors, which allows the counselor to supervise the prisoner while standing outside the office.

government withheld "important exculpatory evidence that should have been provided under *Brady*, *Giglio* and *Jenks*," he does not point with any particularity to any of the evidence used against him in the Newark trial which he claims came from the contents of the FCI-Fairton tapes. Nor does petitioner explain how the government's possession of the FCI-Fairton tapes prejudiced his defense. Violations of Sixth Amendment claims "are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Because the petitioner's claims are so general and because he fails to state with particularity how he was prejudiced, defendant's claim "provides no justification for interfering with the criminal proceedings against [him] . . . ." *Id.* at 367.

3. *Petitioner's claim that the tapes are needed to defend the Newark and Jacksonville actions is without merit*

Petitioner also claims that the tapes and transcripts are necessary to assist him in defending his cases in Jacksonville and Newark. Petitioner's claim is without merit. First, petitioner has not provided any information regarding how the tapes would be of assistance to his defense. Second, with respect to the Newark action, the Judge who presided over the action has already rejected this claim. *U.S. v. Pellulo*, 971 F. Supp. 161 (D.N.J. 1997). Specifically, petitioner filed a motion for new trial, based on his claim that he had recently learned of the government's possession of his prison conversations. The Newark Judge, who is much more

familiar with the details of the Newark action, denied the motion concluding that the government did not subpoena any taped conversations between petitioner and his Newark attorneys, and that the Newark prosecutors were not privy to any communications between petitioner and his attorneys. *Id.*

## IV. CONCLUSION

Based on the foregoing discussion, the Court concludes that petitioner has failed to demonstrate a "particularized need" for the grand jury materials. *See Catania*, 682 F.2d at 63-64. Specifically, petitioner has not shown that the materials requested are needed to avoid "possible injustice in another proceeding." *Id.* By contrast, the government's need to protect the materials petitioner seeks is high given the policies behind grand jury secrecy. Disclosure of the materials required by petitioner would reveal the nature of the investigation, the identity of targets of the investigation, and the identity of potential witnesses. This breach of grand jury secrecy would subject grand jury witnesses to the prospect of retaliation, and enhance the dangers of perjury and witness tampering. Therefore, petitioner's motion will be denied.

An appropriate Order follows.

*Appendix B*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GRAND JURY
NO. 95-347-03

IN RE GRAND JURY PROCEEDINGS

ORDER

**AND NOW**, this 3rd day of **September, 1998,** upon consideration of the petitioner's motion for disclosure of materials relating to proceedings before a federal grand jury, and the government's response, it is **ORDERED** that the motion is **DENIED**.

AND IT IS SO ORDERED.

s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

## APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 23, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1804

IN RE: GRAND JURY PROCEEDINGS

On Appeal from an Order Entered in the
United States District Court for the
Eastern District of Pennsylvania
(Grand Jury No. 95-mc-00347-3)
District Judge: Hon. Eduardo C. Robreno

SUR PETITION FOR REHEARING

Present: BECKER, *CHIEF JUDGE*,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE
and RENDELL *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

*Appendix C*

BY THE COURT,

s/ Theodore A. McKee
Circuit Judge
Hon. Theodore A. McKee

**AUG 23 1999**

## APPENDIX D — EXCERPTS FROM PETITION FOR DISCLOSURE OF MATTERS OCCURRING BEFORE, AND COLLATERAL TO, THE GRAND JURY PURSUANT TO F. R. CRIM. P. 6(e)(3)(C)(i) DATED FEBRUARY, 1998

**IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Grand Jury No. 95-34

IN RE: GRAND JURY PROCEEDINGS

LEONARD A. PELULLO,

Petitioner.

**PETITION FOR DISCLOSURE OF MATTERS OCCURRING BEFORE, AND COLLATERAL TO, THE GRAND JURY PURSUANT TO F.R.CRIM.P. 6(e)(3)(C)(i)**

LEONARD PELULLO ("Petitioner" or "Pelullo"), by and through his undersigned counsel, hereby moves for an order directing disclosure and delivery to him of the matters occurring before, and collateral to, the grand jury as hereinafter described, and states:

### I. RELIEF SOUGHT

1. Petitioner seeks an order directing the government to disclose and deliver to him the following: i) the full and complete return made by FCI Fairton in response to grand jury subpoenas issued by a federal grand jury sitting in

Philadelphia during 1995 seeking tapes, transcripts and other papers relating to Petitioner's telephone conversations while a prisoner at that facility; and ii) all telephone tapes so provided; and iii) all transcripts of telephone tapes; iv) copies of all such grand jury subpoenas; v) the submissions, if any, made by the government to the grand jury which were derived from such return, tapes, transcripts and subpoenas.

* * *

## BACKGROUND

Mr. Pelullo is currently being subjected to three federal criminal prosecutions: in the Eastern District of Pennsylvania (the "Philadelphia action"); in the District of New Jersey (the "Newark action"); and in the Middle District of Florida (the "Jacksonville action"). The government's investigations and prosecutions of Mr. Pelullo have been conducted concurrently for over 10 years.

In January 1995, Mr. Pelullo was incarcerated as a result of a conviction at the fourth trial in the Philadelphia action.[1] While incarcerated, the government monitored and taped all of Mr. Pelullo's conversations, including his attorney client

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1. Mr. Pelullo has been tried four times in Philadelphia. The Third Circuit has reversed each conviction. *U.S. v. Pelullo*, 964 F.2d 193 (3d Cir. 1992), 14 F.3d 881 (3d Cir. 1994) and 105 F.3d 117 (3d Cir. 1997). (One of the trials ended in a hung jury). Most recently, the Third Circuit ordered a re-trial on one count, and a hearing on the remaining counts. The remand hearing occurred on January 23, 1998. Thus, Mr. Pelullo has been incarcerated for almost five years without a valid conviction.

privileged communications. Unbeknownst to Mr. Pelullo, the Philadelphia prosecutors subpoenaed and obtained those privileged communications for the period January through November 1995, and a period in 1996 through a separate grand jury. It is these tapes that Mr. Pelullo seeks to obtain.

In 1994, Mr. Pelullo was indicted in the Newark and Jacksonville actions. Mr. Pelullo's trial in the Newark action began in September 1996 and lasted approximately six weeks. In November 1996, the jury found Mr. Pelullo guilty on all counts. Mr. Pelullo was sentenced in December 1997, and the matter is currently on appeal before the Third Circuit. The Jacksonville action is still in a pre-trial stage.

### A. The Government Obtained Tapes of Mr. Pelullo's Conversations Including Privileged Communications Through Subpoenas of a Grand Jury in Philadelphia

The government had a subpoena issued to the prison where Mr. Pelullo was incarcerated which sought tapes of *all* telephone conversations Mr. Pelullo had while incarcerated beginning from January 1995. Exhibit 1, Government Brief ("Gov. Br.") dated 4/10/97 p. 2 n.2. The subpoenas were issued pursuant to a separate grand jury from the Eastern District of Pennsylvania. Mr. Pelullo did not know of the existence of the grand jury, or the subpoenas, until after the Newark trial ended.

The prison responded that it was technically unable to comply with the subpoena. The prison stated that it could provide tapes based on the phone number called from the

prison. Between June 28, 1995 and November 6, 1995, the government obtained subpoenas which listed specific phone numbers.[2] The time period covered by the subpoenas was January 28, 1995 through no later than November 6, 1995. Ex. 1, Gov. Br. 4/10/97 p. 2 n.2. The government had another subpoena issued in March 1996 for additional conversations. Mr. Pelullo has never seen the subpoenas.

### B. The Government Disclosed and Used Portions of The Grand Jury Subpoenaed Tapes in a Civil Forfeiture Proceeding and the Government Affirmative Suppressed their Existence from Mr. Pelullo

In a civil forfeiture hearing related to the Philadelphia criminal action, the government disclosed portions of the tapes and transcripts it obtained pursuant to the grand jury subpoenas. To gain admissibility of the tapes and transcripts, the government called Diane Noble, an employee of the Federal Bureau of Prisons, to testify. Ms. Noble testified that all of Mr. Pelullo's conversations while at FCI Fairton were monitored and recorded. Mr. Pelullo was not a party to that proceeding, was not present at that hearing, and did not have the opportunity to cross-examine Ms. Noble regarding her testimony. Mr. Pelullo also was not given notice that the tapes of his conversations would be disclosed.

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2. The government obtained these tapes from FCI Fairton where Mr. Pelullo was incarcerated at the time. The government stated it did not have tapes from the Union County Correctional Facility where Mr. Pelullo has been incarcerated from January 1996 to January 1998; the government has been silent as to tapes from FCI Schuylkill, where Mr. Pelullo has also been incarcerated.

In fact, the government affirmatively sought to keep Mr. Pelullo from learning that it had monitored all of his telephone calls. At the conclusion of the forfeiture hearing, the Philadelphia prosecutors (who are the same prosecutors in the Philadelphia criminal action) requested that the briefs and trial transcript be sealed. The Philadelphia prosecutors made this motion even though they acknowledged that the matters in the forfeiture proceedings may be "relevant" to the Newark criminal trial (which was occurring at that time), and Mr. Pelullo would be entitled to them under Fed.R.Crim.P. 16, and possibly *Brady*, *Giglio* and *Jencks*. The Philadelphia district court granted the motion:

> [Assistant U.S. Attorney]: I understand the Newark case has commenced trial. *There are matters in here that may be relevant to what's going on in Newark*. We don't know, we're not involved in that. And my suggestion is if it's acceptable to the Court, I believe it's acceptable to Mr. Heine and Mr. Connell, that *the briefings and the transcripts of today's hearing be filed under seal until the Newark trial is over*. So, that there is no risk that anything that's said here impacts on that proceeding?
>
> THE COURT: That would be probably a good idea. You never know when they're going to take an interest in something like this, okay.

Ex. 2, Philadelphia Tr. 9/26/96, pp. 101-02; emphasis added. The order sealing the forfeiture hearing record is Exhibit 3.

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Mr. Pelullo only obtained a copy of the transcript of the forfeiture hearing after the district court in the Philadelphia forfeiture action issued an order unsealing the record on February 14, 1997. Exhibit 4. (The unsealing order was entered about three months after the Newark trial.)

### C. Through Its Subpoenas, The Government Obtained Hundreds of Privileged Telephone Conversations Which Disclosed Mr. Pelullo's Defense Strategy

During the time period covered by the subpoenas, Mr. Pelullo held numerous conversations with (1) Edward Plaza and Dave Fassett of Arseneault & Krovatin, his first attorneys in the Newark case; (2) Neil Eggleston and other attorneys at Howrey & Simon, his attorneys in the Philadelphia criminal action; (3) David Talbert of Baumer, Bradford & Walters, his attorney in the Jacksonville criminal action; (4) Richard Sarafan and other attorneys at Richard & Richard, his attorneys in a civil case involving the same transactions as the Newark criminal action; and (5) other attorneys concerning civil litigation relating to the criminal actions. Mr. Pelullo also held conversations with numerous witnesses (and their attorneys) who have relevant information concerning the three criminal matters. The government has not produced any of these taped conversations.

In addition to obtaining calls between Mr. Pelullo and the person identified with the phone numbers on its subpoenas, the government obtained conversations of third party transferred calls. The government admitted that Mr. Pelullo often placed a call to one person, and then had that

person transfer him to another person. Ex. 1, Gov. Br. 4/10/97 p. 2 n.2. Mr. Pelullo made hundreds of these transferred calls to his attorneys in this manner.[3] Most of his third party transferred calls were privileged communications to attorneys. By calling his family collect, and then having them transfer the call to an attorney, his family (and not the attorney or witness) would incur the cost of the call. A sample from the incomplete set of 1995 long distance phone bills from Mr. Pelullo's family showing the phone numbers (with a list of the corresponding attorneys' name) to whom Mr. Pelullo was transferred is Exhibit 5.

In the conversations the government intercepted, Mr. Pelullo and his attorneys discussed the expected evidence, documents, witnesses, testimony, etc. in the Newark, Philadelphia and Jacksonville actions. They also discussed the defense strategy for combatting the expected government's cases, as well as preparing Mr. Pelullo's cases. These discussions were quite detailed given that many of the expected government witnesses in the Newark and Jacksonville cases previously testified in Philadelphia. Mr.

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3. Below is chart (based on incomplete phone records) showing the number of calls per month (totalling over 350) during 1995 between Mr. Pelullo and an attorney which were transferred from his family to the attorney. The local calls to attorneys Walter Phillips and Kathleen O'Connell do not appear on the phone bills, and are not included in the chart, but were recorded.

| | | | | | |
|---|---|---|---|---|---|
| January | – 9 | May | – 18 | September | – 42 |
| February | – 30 | June | – 23 | October | – 27 |
| March | – 42 | July | – 19 | November | – 51 |
| April | – 14 | August | – 48 | December | – 29 |

Pelullo also discussed how evidence, testimony, etc. in one criminal or civil case would affect other cases, especially given the overlap between the Philadelphia, Newark and Jacksonville (criminal and civil) actions. These calls also constitute work product which were made in preparation of litigation.

### D. The Government Ultimately Does Not Dispute That It Possessed These Tapes and Transcripts

At first, the government in Newark denied the existence of any tapes or transcripts. For example, the government did not produce any such documents under Fed.R.Crim.P. 16.

During trial, on September 30, 1996, the Newark prosecutor informed the Newark district court and Mr. Pelullo that the government in fact had tapes of conversations between Mr. Pelullo and Andrew Heine, but no other tapes. Ex. 6, Newark Tr. 9/30/96 p. 794-96. It was these tapes and transcripts that the government disclosed at the Philadelphia forfeiture hearing.[4] At that time, the government denied the existence of any other tapes.

The prosecutor's statements after the Newark trial contradict his statements during trial. In the post-trial April 10, 1997 brief (Ex. 1, p. 2, n.2), the prosecutor disclosed for the first time that the government had tapes in addition to those of Heine:

4. Mr. Heine was a key government witness in the Newark trial, and the government's adversary in the Philadelphia forfeiture hearing.

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> It was ultimately discovered that recordings of Defendant's conversations from FCI Fairton were obtained pursuant to grand jury subpoenas issued between June 28, 1995 and November 8, 1995, by a grand jury sitting in the Eastern District of Pennsylvania, which investigation is still pending.

The government asserted it could not produce the tapes because they were obtained under a grand jury subpoena. It acknowledged the tapes should have been produced if they contained relevant conversations of Mr. Pelullo, constituted *Jencks* material, or if Mr. Pelullo provided some basis for their disclosure. Ex. 1, Gov. Br. 4/10/97 p. 2 n.2. The government stated it never undertook to determine their relevance or to see if they contained any *Brady*, *Giglio* or *Jencks* material. Further, since the government denied possession of any tapes, the government foreclosed Mr. Pelullo from seeking to obtain the tapes or show a basis for their disclosure.

* * *

**B. Mr. Pelullo Has a "Particularized Need" For the Documents Under a Rule 6(e) Analysis**

As explained above, Rule 6(e) does not apply. Nevertheless, even under a Rule 6(e) analysis, Mr. Pelullo can show a particularized need for the tapes and transcripts.

Rule 6(e)(3)(C) authorizes disclosure of grand jury matter by court order and states, in pertinent part:

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> Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made — (i) when so directly by the court preliminarily to or in connection with a judicial proceeding;

The party moving for disclosure must demonstrate (1) "the material [he or she] seek[s] is needed to avoid a possible injustice in another judicial proceeding," (2) "the need for disclosure is greater than the need for continued secrecy," and (3) the "request is structured to cover only material so needed." *Douglas Oil*, 441 U.S. at 222, 99 S.Ct. at 1674.

Mr. Pelullo has a particularized need for the tapes and transcripts. The Newark District Court held that if the government possessed tapes of attorney client privileged communications, then Mr. Pelullo's sixth amendment rights would have been implicated and Mr. Pelullo would be entitled to some relief. The court, however, found that Mr. Pelullo could not demonstrate the government has the tapes. The only way for Mr. Pelullo to establish that the government, in fact, possessed attorney client privileged communications, is for Mr. Pelullo to review the tapes and transcripts.

Mr. Pelullo also needs the tapes and transcripts as part of his defense in Philadelphia. The Third Circuit ordered a reversal and new trial on one of the counts. That new trial may also include the remaining counts depending upon the results of the remand hearing. The material will be crucial to Mr. Pelullo as he prepares for the new trial in Philadelphia. For example, the material constitutes potential impeachment

evidence concerning what witnesses told Mr. Pelullo. The material will be similarly crucial to his defense in the Jacksonville criminal action, including pre-trial investigation and the trial itself.

The government's possession of the attorney client privileged communications in these circumstances is substantially similar to the situation in *Alderman v. United States*, 394 U.S. 165 (1969) where the U.S. Supreme Court held that a defendant is entitled to copies of tapes illegally obtained by the government. In *Alderman*, after the defendant's conviction was affirmed on appeal, and the Supreme Court denied certiorari, the defendant learned that the government had illegally wiretapped his phone. On a petition for rehearing, the Supreme Court vacated the conviction, and remanded for an evidentiary hearing to determine whether the illegal wiretap tainted the conviction, and violated the defendant's fourth amendment rights. 390 U.S. 136 (1968). The Supreme Court rejected the government's "ex parte determination" that none of the evidence arose from the illegal wiretap:

> Reading the response of the Government to admit that Alderisio's conversations had been overheard by unlawful electronic eavesdropping [footnote omitted], we granted the petition for rehearing over the objection of the United States that "no overheard conversation in which any of the petitioners participating is arguably relevant to this prosecution." In our per curium opinion, 390 U.S. 136 (1968), *we refused to accept the ex parte determination of relevance by the Department of*

> *Justice in lieu of adversary proceedings in the District Court*, vacated the judgment of the Court of Appeals, and remanded the case to the District Court for further proceedings.

394 U.S. at 167-68; emphasis added.

The government then filed a motion to modify the order, requesting that the district court review the tapes in camera before the tapes are provided to the defendant. The Supreme Court denied the government's motion, and held that where the government illegally wiretaps a defendant's phone, the defendant is entitled to copies of the tapes even without the tapes being screened by the district court in camera, because the defendant is in the best position to determine how the government may have used the improperly obtained material (394 U.S. at 182):

> An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case.

These same principles should apply here to the government's improper monitoring and taping of privileged communications. Mr. Pelullo is similarly in a better position to determine how the government has used his privileged communications against him. Without having copies of the tapes and transcripts, Mr. Pelullo is virtually precluded from establishing the government's possession of the tapes. As the Supreme Court noted in *Alderman v. United States*, "if the hearings are to be more than a formality and petitioners not left entirely to reliance on government testimony," the tapes must be provided to the defendant. 394 U.S. at 183.

The only way to avoid a possible injustice, and prevent the government from obtaining a conviction through improper means, is to provide Mr. Pelullo with a copy of the transcripts and tapes. Mr. Pelullo will use the transcripts and tapes to establish the government's violation of his sixth amendment rights and intrusion into his attorney client privilege. Mr. Pelullo will also use the tapes to show that the government possessed important exculpatory evidence that should have been provided under *Brady*, *Giglio* and *Jencks*.

The government apparently does not have a significant need for secrecy of these tapes and transcripts. The government has already disclosed a portion of the tapes and transcripts during the Philadelphia forfeiture hearing. In addition, the tapes and transcripts do not impinge upon the secrecy of the grand jury proceedings itself, but only concern documents subpoenaed by the grand jury which were independently created. For the same reasons that Rule 6(e) should not apply at all, the government does not have a need for secrecy.

Finally, Mr. Pelullo's is request is structured only to cover the needed materials. Mr. Pelullo is only requesting the tapes and transcripts of his conversations.

## CONCLUSION

For the reasons stated herein, Mr. Pelullo requests that this Court order the disclosure of the tapes and transcripts the government possesses of Mr. Pelullo's conversations while he was incarcerated, and grant such further relief as this Court deems just and proper.

Dated: February __, 1998 Respectfully submitted,

LEONARD PELULLO

By: s/ [illegible]
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## APPENDIX E — EXCERPTS FROM GOVERNMENT'S RESPONSE TO PETITION FOR DISCLOSURE OF GRAND JURY MATTERS DATED MARCH 27, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

G.J. NO. 95-347

IN RE:

GRAND JURY MATTER

GOVERNMENT'S RESPONSE TO PETITION
FOR DISCLOSURE OF GRAND JURY MATTERS

I. *INTRODUCTION*

In an extraordinary attempt to invade an ongoing grand jury investigation and to forum-shop after being denied by a federal court in the district of New Jersey the relief he seeks here, petitioner Leonard Pelullo seeks disclosure from the government of grand jury subpoenas issued in the investigation, minutes of proceedings before the grand jury, and tapes and transcripts of telephone conversations that he made from a prison telephone that were subpoenaed in the investigation. To justify this remarkable request, he claims that the material he seeks contains *Brady*, *Jencks*, and Fed.R.Crim.P. Rule 16 material that was improperly withheld in criminal proceedings against him in the district of New Jersey. He claims further that the tapes he seeks contain "hundreds" of conversations covered by the attorney client privilege.

* * *

*Appendix E*

C. *Conversations on the prison phones are not protected by privilege.*

To the extent that Pelullo claims that he is entitled to discover taped conversations made from the prison telephone that contain material protected by attorney-client privilege, his claim is meritless. None of the conversations Pelullo made on a telephone line that he knew was monitored and recorded and in direct violation of Bureau of Prison regulations against making third-party calls were protected by attorney-client privilege, since he had no expectation of privacy in those calls.

The parameters of attorney-client privilege are set forth in *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D.Mass. 1950):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

The privilege simply does not exist if the communication was not made in private — in other words, if it occurred in the presence of anyone other than the client's lawyer or the lawyer's employee.

In this case, the facts make clear, as Judge Kelly ruled in the Heine forfeiture proceeding, that the circumstances under which Pelullo made whatever calls he claims to have made to attorneys defeat his claim of privilege. He made the calls for which he claims privilege not on the unmonitored prison line available for that precise purpose, but on a telephone he knew was both monitored and recorded. Indeed, that he or an attorney with whom he spoke identified themselves and announced that their conversation was "privileged" simply demonstrates Pelullo's awareness and expectation that his call was not private. Therefore, he had no expectation of privacy in the telephone calls. *United States v. Van Poyck*, 77 F.3d 285, 290-91 (9th Cir. 1996); *United States v. Noriega*, 764 F.Supp. 1480, 1487-88 (S.D.Fla. 1991). Simply invoking the "attorney" label in a conversation does not manifest an intent to engage in a privileged, confidential attorney-client communication. *Noriega*, 764 F.Supp. at 1487, n.6.

In an abundance of caution, however, the government has taken steps to screen out calls between Pelullo and persons known to be his attorneys. To date, seven such calls have been neither listened to nor transcribed. To the extent that the government may have inadvertently transcribed a telephone call between Pelullo and an attorney made on a monitored line, the call is not protected by attorney-client privilege.

* * * *

## APPENDIX F — EXCERPTS FROM TRANSCRIPT OF HEARING OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JUNE 17, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

95-CR-347-03

IN RE:

GRAND JURY MATTER.

Philadelphia, PA
June 17, 1998
4:30 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE EDUARDO C. ROBRENO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: JOAN L. MARKMAN, ESQUIRE
FRANK A. LABOR, III, ESQUIRE
Assistant U.S. Attorney
JOAN K. GARNER, ESQUIRE
Deputy Chief, Defensive Litigation
615 Chestnut Street, Suite 1250
Philadelphia, PA 19106-4476

*Appendix F*

| | |
|---|---|
| For the Defendant: | THOMAS COLAS CARROLL, ESQUIRE<br>Carroll & Cedrone<br>Public Ledger Building, Suite 940<br>150 Independence Mall West<br>6th & Chestnut Streets<br>Philadelphia, PA 19106 |
| Audio Operator: | GREG BOYLE |
| Transcribed by: | DIANA DOMAN TRANSCRIBING<br>P.O. Box 129<br>Gibbsboro, New Jersey 08026-0129<br>Off.: (609) 435-7172<br>Fax.: (609) 435-7124 |

Proceedings recorded by electronic sound recording; transcript produced by transcription service

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* * *

*Appendix F*

[42] Truman – Cross

* * *

Q And, with respect to unmonitored telephones, how many were available?

A They have three counselors and a case manager and a jail administrator that they could submit a request to make an unmonitored phone call to. They all have individual phones.

Q And, what is the actual practice with respect to making unmonitored telephone calls with regard to how many one a man is allowed to have?

A There is no limit.

Q Well, it must be an enormous administrative burden, is it not, to have inmates making these unmonitored calls?

A Staff has not complained.

Q Where are the calls physically placed from that are the unmonitored calls?

A Generally, they are made by the correctional counselors and would be made in a correctional counselor's office.

[43] Q And, the correctional counselor is a guard, is that the correct term?

A No, he is not. He is usually a promotion up from a guard. But, his responsibility is to address the individual issues of the inmates.

Q And, don't those offices contain the files that may deal with prisoner — prison matters?

A They have some files in there. Most of the main files are maintained under lock and key in the central area. But, there's files in there, yeah.

Q There may be confidential papers in there of various sorts, correct?

A There could be.

Q Important matters that maintain secrecy for prison discipline?

A Could be.

Q So, the correctional counselor certainly doesn't allow the inmate in the room unsupervised, does he?

A No, he's — the inmate is never in the room unsupervised.

Q Which means the correctional counsel can hear the inmate's side of the conversation, correct?

A No, the walls and the door are glass.

Q Doesn't that vary from correctional counselor to correctional counselor as to what their policies are?

A No.

[44] Q Do you have any written policy that says that they must leave the room?

A There were no written policies at that time. There are now.

Q And, what do those — do you have them with you?

A No, I did not bring it with me.

Q When did the new pol — when did the policy come into effect that you've made reference to?

A Approximately a month ago.

Q As a result of this case?

A Yes.

Q All right. What does the policy say?

A That the staff will remain outside the room with or without the consent if the inmate.

Q Well, why would the inmate possibly not consent to the staff member remaining outside?

A It came to my attention that some of the staff were asking the inmates if they can remain in the room while they made the legal phone calls because of this case. And, we — I contacted the warden and advised him that that is not

advantageous to our policy and our procedures and so he issued a memo that all counselors are to be outside the room with — and they don't need to ask the inmate for permission, just step out of the room and watch through the glass doors.

Q So, I take it as a result of this case and the issues that [45] surrounded it, you discovered that some of the counselors were not, in fact, leaving these men by themselves to make the calls without the counselor being present, is that a fair statement?

A That is correct.

Q All right. Now, Ms. Truman, are you the official at the prison who is responsible to respond to subpoenas for these telephone records?

A It depends on what's exactly being asked.

Q Well, let's say a subpoena for a particular inmate's reported telephone calls?

A No, I am not responsible for that. That would be the supervisory investigative special agent's area. In fact, the technician in that area is responsible for responding to the subpoenas. I only approve them, disapprove them or seek additional information.

* * *

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[78] Pelullo – Direct

* * *

Q All right. Were you represented by counsel on these various cases?

A Yes, except for Newark. I had counsel indirectly, and Newark I was pro se during that period of time with standby counsel. The Court appointed Ed Plaza as my standby counsel.

Q So, even though you were pro se, you had a standby counsel who you were permitted – or that you would have reason to consult with, is that correct?

A Correct. He advised me along the way.

Q Is it fair to say then that during the period 1995 through 1997 you had at least four to five separate lawyers that you were consulting with on these cases?

A At least that amount.

Q Now, sir, the — calling your attention to January of 1995 at Fairton, would you describe for His Honor the practice dealing with unmonitored telephone calls that was then in place at Fairton?

A Well, you would — if you wanted a so-called unmonitored call, you would go — approach a counselor or the case manager or the unit manager and ask for an attorney — what

they call an attorney's call. You'd have to place a cop-out and then they would let you know when you could make the call. When you went into the office, you would give them the number for the attorney and they would make the collect call, confirm that the [79] attorney is on the line, and then hand you the phone. And, then they would sit through the conversation.

Q Now, that's what I was about to ask you about the actual presence of the officials during the conversation. What was the practice, as you observed it, in January of 1995?

A The practice was that whoever made the call for you would stay in the room. They would not leave the room.

Q And, did that remain true throughout all of '95 and 1996?

A That was — I don't know about '96. I left in I think it was October of '95. But, during the time period that I was there, if you were to attempt to make the unmonitored call, the person that made the call would stay in the room.

Q And, did you ever have any discussions with any of these officials as to the reason for that?

A I asked and they said that we — I can't leave you alone in the office. I have files, I have this phone, don't worry about it. And, I said, well, that's not really an unmonitored call. And, they said, well, we're not — I'm not going to leave you here.

Q Now, sir, with respect to the number of phones that were available for these unmonitored calls, would you explain to

His Honor what your understanding was on how many phones were so available?

A It's not so much the number of phones, it's the people availability to make the call. There's — obviously, they have [80] phones for you to make the call. The question is getting someone to make the call, having the time to place it. You'd have to put a cop-out in and it could take two, three days to get to your lawyer. There were two or three people that were responsible for the calls. And, it didn't come down to the access of the phone, it came down to the access of the person that could place the call.

Q And, were there administrative difficulties in making the calls in that fashion?

A Well, whenever a counselor would show up in a unit, there's 20 guys waiting in line with various problems that they have. And, they have to deal with those problems and see how to fit you in. I mean, there's 200 people there and there are not three people on a shift all the time to handle everybody.

So, what happens is the counselor will come in and he's barraged at his door by a number of inmates who will have any number of problems that he's got to deal with, not only attorney client calls. And, if you need to make a call for 20 minutes, he may have an hour to deal with 20 people and he'll tell you come back and we'll do it another time or it's a hit or miss type situation.

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Q Now, it's been stated that calls made in the way in which you've described were unmonitored and untaped. Was that your understanding at that time?

A Well, when I asked the counselor or the person in charge, I [81] said, is this call — is this phone monitored as well? He said he couldn't tell me because that — for security reasons. And, I wanted to know because they say that they can tap any phone in the institution. So, I said, is this call going to be taped? He said, I can't tell you that. And, that was what I was told.

Q Now, sir, with regard to the use of the monitored telephone calls — telephones, rather, were you aware that the BOP was recording your conversations?

A Not in their entirety, no.

Q Now, tell His Honor what your understanding was.

A What is explained to you is that the phones are monitored for security purposes, if somebody is trying to engineer some type of escape plan or some kind of fraud or some kind of illegal activity on the phone. And, it's not for your everyday call. They say that they monitor to check the phones, to make sure no crimes are being committed while you're there.

Q Now, sir, did you use the monitored lines for attorney/client communications?

A Yes, I did.

Q Did you have a practice with respect to any preface that you had put on the telephone conversation when you would have such a conversation?

A Yes, I made my attorney identify himself, that this was a privileged communication and that these were privileged [82] conversations. When I had the conversations with the people in charge, they said, we're not really interested in your attorneys and that's not a problem. So, I said, well, if I have him identify, would that be enough? And, they said, we're not looking to monitor your calls with the attorneys, we're looking for crimes.

Q Was it your understanding, therefore, that the Bureau of Prisons was agreeable to the arrangement that you were making of identifying, even on the monitored calls, those calls that would be attorney/client?

A I don't know about the Bureau of Prisons, but I know that the people at the hold-over unit knew I was using the phone to talk to my attorneys and explained to me that it would not be a problem because of the overload.

Q Now, sir, on Government Exhibit 8, a sub exhibit marked Government Exhibit 2A, there's a conversation between you and Heine where you stated at page 1 of that conversation: "Okay. This conversation I'm calling attorney/client." Would that be typical of what you would say on these conversations —

A That was stan —

Q — with the lawyers?

A Pardon me. That was standard operating procedure with all my attorneys. Each attorney would identify himself.

Q And, on another conversation you stated: "This is an attorney/client relationship" before you began talking. Would [83] that again be typical of the way you would put that?

A That's correct.

Q Now, did anyone at the Bureau of Prisons ever indicate to you that there was something about this that constituted a waiver of attorney/client privilege for the communications you were making?

A No, not at all.

Q Now, there's been various forms called to the Court's attention that either you signed or that you probably signed with regard to getting notice of recording and monitoring of the calls. Is it correct you did sign most of those forms?

A Yes.

Q Did anyone ever, at the time you signed them, ever call to your attention that that constituted a waiver of privilege with respect to conversations with attorneys?

A No.

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Q Has anyone ever at the Bureau of Prisons ever made any such suggestion to you?

A No.

* * *

[98] Pelullo - Cross

* * *

Q I would like the names of the specific people that you say told you that if you used the monitored lines for your attorney calls that those calls would be considered privileged.

A I never said that. What I said was that they told me that they were not concerned with my attorney privilege — my attorney/client calls and that they could not handle the volume of the calls that I needed to make on the so-called unmonitored procedure. And, they said, you'll have to use the monitored phones.

[99] Q And, did any of those people promise you that those telephone calls would be treated as privileged?

A The privilege issue never got into the discussion. That —

Q Okay. So, you were —

A That — that —

Q — never given a legal conclusion. You were never made a legal promise —

*Appendix F*

A The —

Q — that those telephone calls would be treated by the law as privileged?

A Well, wait a minute. You're talking about a legal promise. Nobody in the prison system ever gives you a legal promise. They never box themselves in to anything, all right. You're not — they don't say to you you can do this and it's legally correct or you can't do. They don't say any of that. They leave it wide open, all right.

All they said to me was that you could — we can't handle the volume of your calls on the unmonitored line, where the guy sits in the room, and you'll have to use the other phones. I said, well, I'm talking to my attorneys and what's going to happen? They said, well, we only listen to — for security reasons. I said, well, I identify my attorneys. They said, well, then you shouldn't have a problem. I said, thank you. That was it. And, I used the monitored — I used the other phones.

* * *

*Appendix F*

## EXCERPT FROM EXHIBIT 1

* * *

**D. ATTORNEY PHONE CALLS:** In order to make an unmonitored phone call between an attorney and an inmate, the inmate must request an unmonitored phone call from his Counselor. Phone calls placed through the regular inmate phones are subject to monitoring.

* * *

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## EXCERPT FROM EXHIBIT 2

### 3. MONITORING OF INMATE TELEPHONE CALLS

The Bureau of Prisons reserves the authority to monitor (this includes recording) conversations on any telephone located within its institutions, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public. An inmate's use of institutional telephones constitutes consent to this monitoring. A properly placed phone call to an attorney is not monitored. You must contact your unit team to request an unmonitored attorney call.

I had read to me . . . the above notification on the monitoring of inmate telephone calls. I understand that telephone calls I make from institution telephones may be monitored and recorded.

Signature of Inmate s/ Leonard A. Pelullo
Date 4-26-93

* * *

*Appendix F*

## EXCERPT FROM EXHIBIT 6

[seal]
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

Pursuant to Bureau of Prisons Inmate telephone regulations:

***All Conversations*** on this telephone are subject to monitoring. Your use of this telephone constitutes consent to this monitoring. You must contact your unit team to request an unmonitored attorney call.

* * * *

## APPENDIX G — EXCERPTS FROM APPELLANT'S MOTION FOR HEARING, AND SUGGESTION FOR REHEARING EN BANC DATED JULY 12, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Appeal Nos. 97-5795
98-6145
98-6146

UNITED STATES OF AMERICA,

Appellee,

v.

LEONARD PELULLO,

Appellant.

APPELLANT'S MOTION FOR HEARING, AND SUGGESTION FOR REHEARING EN BANC

* * *

B. The Government's Review and Use of Tapes of Mr. Pelullo's Attorney Client Privileged Calls from Prison

In furtherance of appeal no. 98-6146, which specifically addressed the government's review and use of tapes of Mr. Pelullo privileged calls from prison, Mr. Pelullo presented evidence the government disclosed for the first time after

the main briefs were filed. That evidence (included within a proposed supplemental appendix) shows that the government listened to over 1,100 tapes of Mr. Pelullo's conversations, including calls specifically relating to the Newark action. For example, there is a subpoena for the telephone number of Kathleen O'Connell, Esq., an attorney who provided legal advice to Mr. Pelullo on the Newark action.[3] That evidence contradicted prior representations the government made to this district court and this Court.

Mr. Pelullo's motion to supplement the record on appeal with that evidence was initially referred to the merits panel. The panel denied the motion to file the supplemental appendix. The panel stated that "from the record before this court, no call to an attorney of record for Pelullo in this case was recorded or transcribed. Op. 21. Mr. Pelullo respectfully submits that the panel's failure to consider the newly produced government evidence was erroneous.

Moreover, the government's violation of Mr. Pelullo's sixth amendment right to counsel and its intrusion into the attorney client relation is not limited to attorneys of record, nor to whether the Newark prosecutors (as compared to the Philadelphia prosecutors) reviewed such privileged communications. This is especially true because the panel found that the Philadelphia shared the contents of at least one taped call with the Newark prosecutors. Op. 21.

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3. In that appendix, Mr. Pelullo also explained how the government used the privileged communications against him in the Philadelphia action.